No. 20,641

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
Defendants, Appellants and Cross-Appellees,

vs.

BETTY K. FURUMIZO, et al.,
Plaintiffs, Appellees and Cross-Appellants.

On Appeal from the United States District Court for the District of Hawaii

BRIEF FOR THE PLAINTIFFS, APPELLEES AND CROSS-APPELLANTS

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JURISDICTIONAL STATEMENT

Appellees and Cross-Appellants Betty K. Furumizo, et al., hereinafter referred to as "Plaintiffs", adopt and incorporate herein the jurisdictional statements of Appellants, hereinafter referred to as "defendant USA" or "appellant USA" or "the Government" and "defendant Baker", or "appellant Baker" or "Baker" respectively, as are more fully set forth in the Decision of the Court below filed on June 21, 1965, and

more particularly paragraphs 3, 4 and 5 thereof (R. 545). The following are the pertinent pleadings necessary to show jurisdiction: the Amended Complaint (R. 12-15), later amended by Stipulation (R. 82-83), the Second (Final) Amended Complaint (R. 695-698), the Pre-Trial Order (R. 371-380) and the amendment thereto (R. 625).

STATEMENT OF THE CASE

With a few minor exceptions which are not considered worthy of comment, Plaintiffs do not controvert the Statement of the Case set forth in the Government's Brief. (E.g., G.Br. p. 4 last sentence and Decision para. 31, R. 555, 556.) However, with respect to any "facts" which this Court might deem material and disputed Plaintiffs would prefer to rely on the findings of fact set forth in paragraphs 12-32 of the Decision (R. 548-557) and the ultimate facts relating to liability set forth in paragraphs 34-42 of the Decision (R. 557-562).

Appellant Baker's Statement of the Case presents a more difficult problem. Beginning with the last paragraph on page 4 of Baker's Brief it becomes argumentative and such portions are therefore controverted.

Plaintiffs' theory of the case with respect to appellant Baker was amended by the filing, with the approval of the Court below, of the Second (Final) Amended Complaint (R. 695-698) and by Order of the Court below (R. 648-649) granting plaintiffs'

Motion to Amend Amended Complaint (R. 624-626) which specifically amended

"the theories of the Plaintiffs against the defendant Baker as set forth in the Pre-trial Order as follows:

'Plaintiffs further contend that under 28 U.S.C. §1332 as citizens of the State of Hawaii they have a claim in an amount exceeding, exclusive of interest and costs, the sum of $10,000.00 against the defendant Baker as a California corporation with its principal place of business in California, *for its negligence in failing to furnish decedent wth an adequately informed and trained instructor pilot,* and for the negligence of its employee Charles Isamu Shima (hereinafter referred to as "Shima") while acting within the scope of his employment as pilot in command of the aircraft in which he was giving dual instruction for hire to the decedent as a student pilot, in taking off or allowing the decedent to take off directly into the jet-wash of the DC-8 aforesaid in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances, thereby causing the aircraft to crash, resulting in the death of the decedent and damages to the plaintiffs as hereinafter more fully set forth.'" (R. 625, 626) cf. B.Br. 4-5 and 11.

The references to the testimony (transcript) beginning at the bottom of page 5 of Baker's Brief and continuing to the bottom of page 8 are argumentative, are therefore controverted and will be covered in argument, *infra.*

The quotations from the Decision of the Court below extending from the bottom of page 8 of Baker's Brief to the bottom of page 10 are isolated out of the total context of the Decision and therefore argumentative and are controverted as inappropriate to a statement of the case. A reading of the Decision as a whole leads to the inevitable conclusion that the Court below found as a fact that Baker's instructor, Charles I. Shima, himself was negligent in taking off or allowing the Decedent to take off under the circumstances. This is positively confirmed by the colloquy between the Court below and counsel which took place at the arguments on the motions for new trials as follows: (Mr. Crumpacker continuing)

> "When I originally read the decision, I had, myself, interpreted as being inherent in the whole decision that Shima was, in fact, negligent, and I think I made that very clear in my memorandum, that——
>
> The Court: Yes. You've covered it; and I agree with you. I think that if the Court had intended to hold that Shima was entirely free from negligence, the Court would have said so.
>
> Mr. Crumpacker: But I'm concerned because of Mr. Padgett's interpretation. I wonder if it wouldn't be wise for the Court, under the rule, to clarify its decision at this point?
>
> The Court: I don't think that's necessary, Mr. Crumpacker.
>
> Mr. Crumpacker: Well, then, may we understand, for the record, that it was the Court's intention, in the writing of the decision, to find that Shima was negligent?
>
> The Court: Well, I've already said that, Mr. Crumpacker". (Tr. 15, October 1, 1965.)

The matter appearing in the last paragraph of Baker's Statement (B.Br. 11-12), pertaining to the arguments urged on the motions to amend and for new trials is also argumentative and therefore controverted. Baker's own direct duty to the Decedent (as contrasted with its vicarious liability for the negligence of Shima) was placed at issue in the trial by way of Plaintiff's Trial Memorandum (R. 302, 303) filed February 28, 1965, well in advance of trial, setting forth the authorities establishing the high degree of care required of a flying school toward its students, which standard was adopted by the Court below in paragraphs 36, 55 and 68 of its Decision, (R. 558, 574, 598). Moreover as will be demonstrated in argument, *infra,* the extent and adequacy of instructor Shima's training by Baker and the relative standards in the community were issues which were in fact fully tried.

With respect to the question of damages, the Court's findings fully set them forth in paragraph 70 of the Decision. (R. 599-605.)

In calculating the special damages, the Court below did not make any adjustment to compensate for the decreasing value of the dollar (D. para. 70(g), R. 602), did not include any interest on the Decedent's earnings which would have been contributed to the family from the date of death to the entry of judgment (D. para. 70(h), R. 602, 603), did deduct the estimated income taxes from Decedent's anticipated future earnings in calculating the present value of the portion thereof which the Court found he would have

contributed to his family (D. para. 70(i), R. 603, 604; para. 71(b), R. 606, 607) and did not allow to the estate the $250 portion of the reasonable burial costs which was paid by the Veterans Administration (D. para. 71(a), R. 605).

In determining the amount of general damages to be awarded to the plaintiff-wife of Decedent the Court below placed itself in the position of average citizens and jurymen in the community (D. para. 71(d), R. 612) rather than exercising its own individual judgment, and also took into consideration plaintiff-wife's prospects of remarriage, health and earning capacity (D. para. 71(d), R. 610).

QUESTIONS PRESENTED[1]

1. The liability of the defendant United States of America through the negligence of its employees, the Honolulu tower controllers.

2. The liability of the defendant Baker for (a) the negligence of its instructor Shima; and, (b) its own negligence in failing to furnish to the Decedent an adequately informed and trained instructor pilot in Shima, and whether this latter question was fully and

---

[1]No issue has been made by either appellant as to the actual cause of the accident nor as to the admission or rejection of any evidence. See Rule 18, 2 (d) of the Rules of this Court. This writer is uncertain as to the extent to which any findings of the Court below have been reserved as error and whether either appellant has stated in its specifications of error "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous". Rule 18, 2 (d) of the Rules of this Court.

fairly tried on the issues joined in the Court below, and if not whether the Judgment against Baker should nevertheless be allowed to stand.

3. Whether in law and/or in fact the Decedent was properly held not to have been contributorily negligent nor to have assumed the risk leading to his death.

4. The question of proximate cause and whether the negligence of both defendants or their employees proximately caused or contributed to the accident.

5. Whether the amount of the judgment below was erroneously determined and was thus excessive or inadequate.

SPECIFICATIONS OF ERROR ON CROSS-APPEAL

1. The District Court erred in failing to adjust the "special damages" to compensate for the decrease in the value of the dollar throughout the period of the Decedent's life expectancy based upon the law and the evidence, including matters of judicial notice.

2. The District Court erred in failing to allow prejudgment interest as required by law.

3. The District Court erred in deducting, contrary to law, estimated income taxes from Decedent's anticipated future earnings in calculating the present value of the portion thereof which the Court found he would have contributed to his family.

4. The District Court erred in refusing to allow the $250 portion of the reasonable burial costs which was paid by the Veterans Administration as damages

to the estate against the defendant Baker as required by law.

5. The District Court erred in its determination of the general damages allowed to the wife of Decedent by the Court placing itself in the position of an average citizen and juryman in the community rather than based on the Court's own individual judgment, as required by law.

6. The District Court erred in its determination of the general damages allowed to the wife of Decedent by taking into consideration her (favorable) prospects of remarriage and her employment, health and earning capacity, contrary to law.

STATUTE AND REGULATIONS INVOLVED

In addition to the statute and regulations set forth in the appendix to the Government's Brief (G.Br.), others considered material to the Court below are set forth in paragraphs 57-63 of the Decision (R. 575-581).

SUMMARY OF ARGUMENT

The Supreme Court has held, and this Court has followed the principle, that in any given situation where air traffic is being controlled (by the Federal Government) there are concurrent duties devolving on the pilots of the aircraft and the tower controller personnel. Each case must be decided on its own facts since the ultimate question is one of fact. Therefore

the sole test is whether there was *any* evidence which would sustain the trial court's findings. It would be only in the absence of any such evidence that the findings could be disturbed as being "clearly erroneous". The function of this Court is not to try the case *de novo* on the whole record. (Although the foregoing principles are elementary, the arguments of both appellants in many instances have totally overlooked them.)

There was evidence to sustain the finding of the Court below that the tower controllers did not act "according to the book" (ATM-2-A) and were thus negligent. There was overwhelming evidence upon which it was found that the Manual was not the sole controlling authority but was supplemented by specific directives addressed to the standard required of the controllers in instances such as involved in this case which they openly and admittedly failed to follow. Moreover, as a matter of law a Manual which does *not* have the force and effect of law cannot be relied upon to establish a standard of care. And in any event, regardless of whether the action of a tower operator in any particular instance is customary, it still may be, and was found as a matter of fact in this case to be, negligent.

There was conflicting evidence on the meaning of a clearance for takeoff from which the trial court made its finding of fact to the effect that implicit therein was the representation that it was safe to proceed in accordance therewith. Thus the Court held as an ultimate fact that the conduct of the tower operators in

issuing such a clearance was negligent under the circumstances, and this was supported by the open and naive admissions of the chief controller himself.

As mentioned, each such case must be decided on its own facts. Therefore it is unprofitable to attempt to compare the decisions of other courts in other cases. Nevertheless, a review of all the decisions involving comparable situations supports the principles of law applied by the Court below and the ultimate finding of the negligence of the control tower operators.

With respect to Baker, there is no question either in law or in fact that its instructor Shima, as the pilot in command, was the person responsible for the *operation* of the aircraft. Although Baker attempted to make a factual issue of this, the overwhelming evidence led the Court below to such an inevitable finding.

The cause of the accident is here undisputed by either appellant. Knowing the cause, the uncontroverted evidence again led the Court below to the only possible finding that Shima's negligence in taking off under such circumstances, with the specific warning which was given and the general knowledge with which he was charged, was a direct and proximate cause of the accident.

Once more we have a factual question which was decided by the trial court. Therefore a comparing of cases is unprofitable. The cases cited by Baker are clearly distinguishable since in each of them, unlike here, the *cause* of the crash was unknown.

The Court below also found on the alternative ground that Baker was negligent in not furnishing to the Decedent an adequately informed and trained instructor pilot in Shima. This was an issue fully tried through testimony relating to Shima's training and the standards of training of instructor pilots in the community. This involved also a question of law relating to the high degree of care owed by a flying school to its students.

Thus, there were two separate findings of fact of negligence leading to the liability of Baker, both of which are supported by substantial and even overwhelming evidence: (1) Baker was liable for the negligence of its employee Shima in taking off under the circumstances, and (2) Baker breached its duty to the Decedent in failing to exercise the high degree of care required of it to make certain that Shima was an adequately informed and trained instructor which the Court found he was not.

Although not expressly pleaded the latter issue was fully and fairly tried and the Court properly allowed an amendment to the Complaint and Pre-trial Order to conform to that evidence and finding of fact.

With respect to the duties and conduct of the Decedent, once more, as a matter of law *and* fact he could not be and on the evidence was held not to be responsible in the circumstances as an unsoloed student, either under the theory of contributory negligence or assumption of risk.

The legal conclusion to this effect is correlative to the argument relating to the duties of the instructor

as the pilot in command. The factual finding to this effect by the Court was supported by substantial and even overwhelming evidence and, therefore, cannot be disturbed on appeal.

On the question of causation, the Court below found as a fact, based on all the evidence, that the negligence of Baker in failing to furnish an adequately informed and trained instructor was a continuing breach of its duty to the Decedent which joined with the negligence of the tower operators in contributing to the cause of the accident. In addition, the evidence that the tower operators should have foreseen, and actually stood by and watched, the negligence of Shima in taking off amply supports the Court's finding of "joint" causation under the law of Hawaii.

With respect to the amount of the damages, the Court below found from ample evidence "with reasonable certainty" what the Decedent's future income would be, thereupon calculating the special damages. This finding is adequate and conclusive under the standards of law applicable in such cases in Hawaii and more than overcomes the "clearly erroneous" test on appeal.

The award of $15,000 to the estate for the fear of impending death and the pain and suffering of being burned alive endured by the Decedent is supported by the evidence as well as other "comparable" cases, and cannot be said to be so shockingly excessive as to warrant interference by this Court, particularly where the award was made by a trial judge. Inherent in the

award is a review by the Court below of the question of its excessiveness.

The *in*adequacy of the damages presented in the Cross-appeal involves, with one exception, questions of law only. The one exception was the failure of the Court below to take into consideration the direct and circumstantial evidence relating to the future decreasing value of the dollar in calculating the special damages. In other portions of the decision the Court did take judicial notice of the current and past decreasing value of the dollar but it flatly rejected the law and the evidence relating to the future. Where there is clear and positive evidence supporting such a claim it would appear to be erroneous for the trier of fact to reject it *in its entirety*. The pay raises placed in effect *since* the trial below establish that the Court's calculations are erroneous at the very least in the amounts reflected in those raises.

The Court below failed to allow pre-judgment interest contrary to the weight of well-reasoned authority which is becoming more predominant in the recent decisions pertaining to death cases. It is fair to assume that the Supreme Court of Hawaii when and if faced with the issue would follow this trend, particularly where the backlog is causing such extensive delays in getting cases to trial.

On the issue of income taxes, the Court below followed what it felt was the better reasoned and more modern minority view in taking into consideration income taxes and thereby "discounting" the special

damages. Since then the Supreme Court of Hawaii has followed the majority view and therefore this Court has no alternative but to direct the Court below to conform.

For unexplained reasons the trial Court failed to follow the collateral source doctrine and the precedent set by this Court and thus erroneously refused to award the $250 Veterans Administration burial allowance as an element of special damages to the Estate of Decedent against the defendant Baker.

With respect to the general damages awarded to the wife of Decedent, the Court below adopted several erroneous theses and considerations. The trial judge "second guessed" what a local jury might award rather than making his own evaluation of such element of damages, taking into consideration the extent of the special damages. The net effect of this approach was that the trial judge took judicial notice that jury verdicts are low in this District and discounted the damages accordingly, contrary to his duty under the law. In so doing he improperly took into consideration the wife's youth (attractiveness), favorable prospects of remarriage, employment, health and earning capacity. Each one of these considerations is irrelevant in a determination of the damages to a wife for the loss of her husband's "love, affection, society, companionship, comfort, consortium, protection, fellowship, marital care, attention, advice and counsel".

ARGUMENT

I. SCOPE OF REVIEW AND APPLICABLE PRINCIPLES OF LAW.

The Government acknowledges and the Plaintiffs espouse the principle which requires this Court to sustain the findings of the trial Court unless, after reviewing all the evidence, it is left with a firm impression that error has been committed and the findings of the Court below were "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. (G.Br. 8 and cases there cited.)

This is particularly true where the evidence is controverted and the trial judge has thus had to weigh the evidence and evaluate the credibility of the witnesses; and where the evidentiary findings are not "clearly erroneous" *and are consistent with the ultimate findings* the judgment will not be disturbed. *Mitchell v. Branch and Hardy,* 45 Haw. 128, 139-40.

As this Court has said, whether or not the action of the tower controllers in any particular instance constitutes negligence, is a question to be determined by the trier of fact. *United States v. Douglas Aircraft Co.,* 169 F. 2d 755 (C.A. 9).

The problem arises when the determination of an ultimate fact involves a question of law and whether or not the trial court properly applied the substantive law to the facts which it found and thus arrived at an accurate ultimate fact finding. This is the principle espoused by the Government wherein it states "quite apart from evidentiary matters, where findings of fact are induced by erroneous interpretations of the law,

they are not binding on the reviewing court". (G.Br. 8, citing authorities.)

A review of those authorities confirms that the ultimate question in each case was one of law. *United States v. Miller,* 303 F. 2d 703 (C.A. 9), cert. denied, 371 U.S. 955, being closest to the case at bar and having been decided by this Court will be singled out as most typical and controlling. In that case, this Court found that the Court below was in error in arriving at an ultimate finding of fact that the decedent Miller was not contributorily negligent because it failed to find *as a matter of law* that he had a duty under the circumstances to maintain a "reasonable lookout" or "to look thoroughly and diligently," which was not relieved by any duty on the part of the tower controller. 303 F. 2d at 708-710.

Plaintiffs agree with the thesis of the Government as to the applicability of the general rules of tort law to this case, i.e. the general principles of negligence law applicable to aviation under the substantive standards of negligence of the State of Hawaii, *in the absence of special statutes.* (G.Br. 9, citing authorities.)

More specifically it is agreed that, "Under Hawaii law, as in all common-law jurisdictions, it is axiomatic that the essential elements of a cause of action in negligence are (a) the existence of a duty on the part of the defendant(s), (b) the negligent failure to perform that duty and (c) an injury resulting directly from that failure." (G.Br. 9, citing Hawaii cases).

With respect to any applicable aviation law, there is no Hawaii precedent which the federal courts are bound to follow. A federal court need not follow unreported decisions of state trial courts, *King v. Order of United Commercial Travellers of America,* 333 U.S. 153, particularly where federal law is involved, *Towner v. Commissioner of Internal Revenue,* 182 F. 2d 903, 907 (C.A. 2).

On the subject of causation, Plaintiffs also rely on *Mitchell v. Branch and Hardy,* 45 Haw. 128, but not on the dicta cited by the Government (G.Br. 10). The rule of law set forth by the Supreme Court of Hawaii in that case may be quoted as follows:

> "One cannot excuse himself from liability arising from his own negligent conduct merely because the later negligence of another concurs to cause an injury, *if the later act was a legally foreseeable event.*" (Emphasis added) 45 Haw. at 138.

On the subject of the scope of review of a trial court's determination of relative fault the *Mitchell* case, *supra,* is also pertinent.

> "Where damages are apportioned—an appellate court should confine its inquiry solely to the question of whether, upon the evidence adduced and the trial court's findings thereon, the apportionment of damages was so clearly erroneous as to shock the moral sense." 45 Haw. at 142.

Actually there was no apportionment in the case at bar even though the Court below stated with respect to the two defendants "that each is equally liable, and that each should pay one half of the judgment" (D.

para. 42, R. 562). Apportionment is only appropriate where the degree of fault is disproportionate. See, Uniform Contribution Among Tortfeasors Act, Revised Laws of Hawaii, 1955, §246-11. In any event, the liability is still joint and several.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE HONOLULU TOWER CONTROLLERS WERE NEGLIGENT IN THE PERFORMANCE OF THEIR DUTIES AT THE HONOLULU AIRPORT AT THE TIME OF THE ACCIDENT INVOLVED HEREIN.

With respect to the negligence of the Honolulu tower controllers, the basic issue is the scope of their duties to the Decedent at the time of and just prior to the accident which led to his death. There is no question but that a duty existed. Perhaps the best framework within which to view the situation would be to quote from this Court's decision in *United States v. Miller,* 303 F. 2d 703, 711 (C.A. 9), *cert. denied,* 371 U.S. 955:

> "The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed. This view is implicit in the decision of the court in Eastern Air Lines v. Union Trust Co., 95 U.S. App. D.C. 189, 221 F2d 62 affirmed sub nom, United States v. Union Trust Co., 350 U.S. 907, 76 S. Ct. 192, 100 L.Ed. 796. The ultimate result reached in that case recognized that both the Government and the air-

line had concurrently breached their duties, and each was held liable."[2]

Whether or not the action of the tower in any particular instance constitutes negligence is a question to be determined *by the trier of fact. United States v. Douglas Aircraft Co.,* 169 F. 2d 755 (C.A. 9).

There is some dispute about whether the takeoff clearance given to the Piper in this case was strictly "according to the book", i.e., Air Traffic Control Procedures, ATM-2-A (GX-5). Although the tower controllers attempted to so represent, with no little confusion, (see, Tr. 1117, 1122, 1165, 1166, 1168), the Court below found that the Manual contained no minimum separation provisions for situations involving intersecting runways which were involved in this case, and went on to say that even if it could be so interpreted and that interpretation were followed, that would "not exonerate tower personnel from the the authority and duty to exercise good judgment where it was obviously required in the interests of safety." (D. para. 66(o), R. 592, 593.) This was in effect admitted by the tower controllers (Tr. 1122, 1168).

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[2]Perhaps it would be appropriate for this Court to take judicial notice of the following related statement recently made by Mr. Oswald Ryan, former chairman of the Civil Aeronautics Board:

> "As a result of the fantastic speeds of aircraft today, the function of preventing midair collisions has been transferred for the most part from the pilot to the controller on the ground."

Honolulu Star Bulletin, April 21, 1966, p. A-13.

In any event, it is clear in this case that the tower controllers considered it their *sole* obligation to follow the "letter" of the Manual (Tr. 985, 987, 1109-12) and the Court below so found that this was their (incorrect) position. (D. para. 41, R. 562; D. para. 68, R. 598).

On the other hand, they admitted that in issuing clearances under such circumstances their responsibilities included the exercise of judgment and discretion (Tr. 987, 996, 1122, 1168), yet they denied that any discretion was used in this instance other than to follow what they thought to be the letter of the Manual. (Tr. 985, 987).

Plaintiffs took (and now take) the position that the Manual in any event could not be relied upon to establish a standard of care and therefore objected to its being admitted in evidence for that purpose (Tr. 1079) based upon the following authority: 20 Am. Jur. *Evidence,* § 1045, p. 886. Cf. *Danbois v. New York Central RR.,* 12 N.Y. 2d 234, 189 N.E. 2d 468 (1963). Although this Court has referred to the Manual as the "bible for tower operators", *United States v. Miller,* 303 F. 2d 703, 710 at n. 16 (C.A. 9), *cert. denied,* 371 U.S. 955, there is nothing in that decision which would intimate that it *limits* the responsibilities of the tower controllers or has the force and effect of law which the Court below in this case correctly concluded that it did not. (D. para. 58, R. 576.)

It is only the applicable Civil Air Regulations, 14 C.F.R. 1, et seq. (1961 Rev.), which are admissible as evidence of the proper standard of care and even

then, compliance therewith, if any, is only considered *evidence of due care.* 1 Kreindler, *Aviation Accident Law,* §§ 10.02 (3) (4) (6) (1963).

Moreover, regardless of whether the action of a control tower operator in any particular instance was customary, it still may very well constitute negligence. *United States v. Douglas Aircraft Co., supra.* See: *Yoffee v. Pennsylvania Power and Light Co.,* 385 Pa. 520, 123 A. 2d 636; *Seaboard Airlines R. Co. v. Pan Maryland,* 105 F. Supp. 958, 964 (D.C. Ga.) Compliance with a general practice does not excuse injurious conduct if it is not consistent with due care. Frumer and Biskind, New York Law and Proof §71.04 (7).

The evidence in the trial of this case very clearly demonstrated that the Manual was *not* the ultimate controlling document. The Government was required to produce many documents including revisions to ATM-2-A and Circulars issued to controllers containing admonitions regarding the dangers of wake turbulence and advising them of what they could and should do to aid in avoiding these hazards to aircraft. They are very thoroughly analyzed by the Court below in paragraphs 66(a) through 66(x) of its Decision (R. 582-596), and it would serve no purpose for Plaintiffs to attempt to elaborate on this analysis. In so doing, the Court adequately disposed of the Government's spurious contention that no definitive directive on the subject other than the Manual happened to be in effect at the time of the accident. (D. para. 66(l), R. 588-590.)

The District Court also made a thorough analysis of the statutes, regulations and directives involved (D. paras. 57-63, R. 575-581) and arrived at the reasoned conclusion that they also placed on the tower controllers a duty to exercise discretion and judgment in the interests of safety under such circumstances (D. para. 64, R. 581), confirmed by the analysis mentioned in the above paragraph.

With this background in mind, a brief review of the Chief Tower Controller Garcia's testimony will easily fortify the District Court's finding of negligence. He was questioned at length on his knowledge of the dangers of wake turbulence and was particularly vague as to his knowledge of the pertinent circulars of which he was responsible to be aware. (Tr. 992-994, 999-1020, 1027, 1028, 1072-1074, 1123, 1124, 1146.) He admitted that these circulars had an effect on or supplemented the procedures set forth in ATM-2-A (Tr. 1062-1063), and yet he stated that *at no time did he consider* instructing Humphreys (the "trainee" controller on the microphone) to hold the Piper for *any* period of time to avoid the turbulence hazard. (Tr. 1004.) The following portion of his testimony where he was being questioned regarding one of the aforementioned Circulars is most enlightening:

> "Q. May I ask you, in reference to the fourth paragraph at the bottom of the first page, after a description of the hazards of thrust stream turbulence with other aircraft, it goes on to say,
>
> 'Under conditions of the type referred to above, and in any other condition where it is anticipated that turbulence could exist, it is prefer-

able that aircraft be delayed until it can be reasonably assumed that a hazardous situation no longer exists.'

Do you see that portion?

A. Yes, I see that portion.

Q. Now, in light of that, can you state whether or not you ever received any instruction which would indicate that you consider delaying aircraft to avoid this type of hazard?

A. No I don't recall that.

Q. Well, reading it now, do you understand that to be what it says?

A. Reading this now, it still doesn't change my way of thinking in reference to—it doesn't change my way of controlling traffic. I'd still control traffic by the Manual itself. And the Manual itself states that under the controller's judgment, if he thinks that the turbulence—or wake turbulence is in existence at that time, he shall issue it accordingly." (Tr. 1010-1011.)

He was unable to square these various admonitions with his prior testimony that he felt his sole responsibility was to issue a warning as indicated in ATM-2-A (Tr. 1020, 1028), in spite of the fact that he later admitted that these circulars were issued to "clarify, explain or further delineate" the procedures set forth in ATM-2-A (Tr. 1063).

Turning to the Government's specific contentions, it is difficult to follow the argument that the clearance given to the Piper could or should be interpreted as a conditional one, not to become effective until the pilot determined that the turbulence had subsided. (G.Br. 22-3.) A more rational interpretation would

be that it was a clearance for takeoff with a caution to anticipate the turbulence *while taking off*. The Piper had to either hold its position or take off. Once the clearance was issued, the latter was the only alternative, since otherwise there would have been no purpose in issuing the clearance. Moreover, according to Garcia *he saw the Piper commence its takeoff immediately after the clearance was issued* (Tr. 342, 343, 365), and this was confirmed by the ground controller Capellas (Tr. 95, 234). At that point Garcia, with his overriding microphone (Tr. 925-6, 1105), had a second opportunity to rectify Humphrey's original error by taking over and instructing the Piper to hold till the turbulence had subsided. It could almost be argued then that Garcia had the last opportunity to take preventive action, particularly in light of the unequivocal and uncontroverted testimony of Professor Lissaman who indicated that once the Piper commenced its takeoff there was no other alternative but a crash due to the intensity of the vortices and the structural and control limitations of the Piper. (See the District Court's analysis of the evidence at R. 561, para. 39, n. 6.) The simple fact remains that Mr. Garcia was not the *slightest bit concerned* as long as the warning had been issued. Such an attitude could best be characterized as an invitation to the pilot of the Piper to commit suicide "but don't say I didn't warn you!"

There was ample testimony to support a reasonable interpretation of the clearance given the Piper as one which contemplated that the Piper would thereupon

and without delay proceed to take off, which in fact it did with the full knowledge and lack of concern of Garcia, the chief controller. (See R. 591, para. 66(n), n. 10 of the District Court's Decision and the testimony of George R. Carter in that regard, Tr. 831, 832, 851, 852, 897, 908-912, 915-922.) In any event there was conflicting evidence on this issue from which the Court below found that such an interpretation of the clearance should have been anticipated by the tower controllers. (D. para. 40, R. 561; para. 68, R. 597-598.)

In this connection, footnote 12 of the Government's Brief (G.Br. 24, 25) contending that the Court below recognized that a clearance is "a mere authorization and not a command" (R. 597) is misleading. The point the Court was making was that whether or not this is so, many pilots are unaware of it in any event and this is something of which the controllers should have been cognizant. None of the cases cited in support of the Government's contention that a takeoff clearance is permissive in nature had to do with takeoff clearances. They all involved *landing* clearances and merely illustrate the thesis set forth in the Flight Information Manual (GX-6) that the issuance of a clearance, such as "cleared to land", does not relieve the pilot from exercising a reasonable degree of caution in executing the provisions of the clearance. *New York Airways Inc. v. United States,* 283 F. 2d 496 n. 12 (C.A. 2). The court there pointed out that this language is addressed to collisions between aircraft. (283 F. 2d at 499.) But in a takeoff situation,

such as involved herein, what opportunity could there be for the pilot to exercise caution other than not to go at all, and then what would be the point in issuing the clearance in the first place? Implicit in a clearance is the representation that it is safe to *proceed* in accordance therewith, i.e., in this case with caution. In this connection see the meaning of "cleared to land" in *United States v. Union Trust Co.,* 221 F. 2d 62 (C.A. D.C.).

As Justice Jackson said in a concurring opinion in discussing the role of the Federal Government in the control of air commerce:

> ". . . . The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls. *It takes off only by instruction from the control tower, . . .*" (emphasis added). *Northwest Airlines v. State of Minnesota,* 322 U.S. 292, 303.

The argument appearing at pages 25 and 26 of the Government's brief is not persuasive of the above issue. There was conflicting evidence on the subject and therefore the findings of the Court below in this regard must stand. (See: G.Br. 26-27, n. 14 and R. 591, D. para. 66(n), n. 10). *United States v. Douglas Aircraft Co.,* 169 F. 2d 755 (C.A. 9); *Mitchell v. Branch and Hardy,* 45 Haw. 128, 139.

The Government argues that the courts have consistently held that "the direct and primary responsibility for the safe operation of an aircraft rests, not with the controllers, but with the aircraft pilot", citing authorities. (G.Br. 27.) It is generally found to be un-

profitable to compare cases. Nevertheless the Court below in its Decision ably distinguishes *United States v. Miller,* 303 F. 2d 703 (C.A. 9) *cert. denied,* 371 U.S. 955. (D. para. 48, R. 566-567.) *United States v. Schultetus,* 277 F. 2d 322 (C.A. 5), *cert. denied,* 364 U.S. 828, (D. para. 49, R. 567-570), and *Smerdon v. United States,* 135 F. Supp. 929 (D. Mass.) (D. para. 45, R. 563-5). The latter case is the only one which was not decided on the basis of contributory negligence. *Wenninger v. United States,* 234 F. Supp. 499 (D. Del.), *affd. w/o opinion* 352 F. 2d 523 (C.A. 3), also went down on the issue of contributory negligence and a finding that the negligence of the Government agents in failing to warn was not a proximate cause of the accident.

Although the *ultimate* responsibility for the safe *operation* of the aircraft may very well lie with the pilot in command, this in no way should be permitted to relieve the controllers of their responsibilities. This is the reverse of the situation in *Miller, supra,* where this Court stated in essence that the trial Court may have felt the primary responsibility was that of the tower controller which might relieve the pilot of his otherwise responsibility. (303 F. 2d at 709, 710.) As was pointed out earlier in the quotation from that opinion, the duties of the pilots and controllers overlap. Even if we should concede that in any particular situation the primary responsibility was that of the pilot in command, conversely *this would not relieve the tower controllers of their otherwise responsibility.* If such were the case, the Su-

preme Court would never have upheld the liability of the Government in *United States v. Union Trust Co.,* 350 U.S. 907. Although this Court never reached the issue of the negligence of the tower controllers in *Miller, supra,* it did discuss the duties of the controllers under the Manual in the circumstances of that case and indicated they were affirmative duties. (303 F. 2d at 710.) Although it is perhaps inappropriate to speculate, a reasonable conclusion to be drawn from the language of that decision is that if Miller had had a passenger along whose estate had brought suit, the Government might very properly have been held a joint tortfeasor as here.

Although the case also was ultimately decided on the question of contributory negligence, Plaintiffs herein and the Court below relied upon *Johnson v. United States,* 183 F. Supp. 489 (E.D. Mich.), affd. 295 F. 2d 509 (C.A. 5) to the effect that

> "The fact that variables prevent the fixing of limits with certainty does not absolve the control tower from a duty to take the turbulence hazard into consideration, but this is merely one factor that may be considered in determining whether under a given set of facts the employees of the control tower did meet the standard of reasonable care." 183 F. Supp. at 492.

and that:

> "In any event, the safety of those using air lanes is not to be sacrificed to traffic expediency." 183 F. Supp. at 493.

(D. para. 52, R. 573.)

The only other case nearly in point is the recent decision in *Hartz v. United States,* 249 F. Supp. 119 (N.D. Ga.) which the Government acknowledges is pending on appeal. (G.Br. 24, n. 11.) As the Court below suggests in its analysis of *United States v. Schultetus,* 277 F. 2d 322 (C.A. 5), *cert. denied,* 364 U.S. 828, the real basis of the decision would seem to be the (primary) negligence of the pilot and not the lack of negligence on the part of the tower controllers. (D. para. 49, R. 567-70.) The Georgia District Court in reliance on the broad principle that Government regulations have the force and effect of law stated that a violation of ATM-2-A must be shown. 249 F. Supp. at 123. There are three basic fallacies to this pronouncement as pointed out earlier:

1. ATM-2-A is *not* a regulation having the force and effect of law (D. para. 58, R. 576); 1 Kreindler, Aviation Accident Law, §§ 10.02 (3), (4) (1963).

2. A limited standard of care cannot be established by the adoption of an operations manual. 20 Am. Jur., *Evidence,* Sec. 1045, p. 886. *Cf., Danbois v. New York Central RR,* 12 N.Y. 2d 234, 189 N.E. 2d 468.

3. The Georgia District Court was apparently unaware of all the changes, bulletins and circulars which had the effect of modifying or supplementing the provisions of ATM-2-A. This cannot be determined conclusively from a reading of the decision but may be fairly presumed since the Court made no mention whatsoever of anything other than the

Manual in discussing the standards of care of the tower controllers—not even the subjective knowledge or standards of the controllers themselves.[3]

For the foregoing reasons it cannot be said that *Hartz* should be given the same consideration as the better reasoned decision of the Court below in this case.

III. THE DISTRICT COURT DID NOT ERR IN HOLDING THE DEFENDANT BAKER LIABLE FOR (A) THE NEGLIGENCE OF ITS INSTRUCTOR SHIMA (B) ITS OWN NEGLIGENCE IN FAILING TO FURNISH TO THE DECEDENT AN ADEQUATELY INFORMED AND TRAINED INSTRUCTOR PILOT IN SHIMA.

At the outset it should be pointed out that most of the Government's arguments attempting to absolve the tower operators in this instance have the net effect of pointing the finger at Baker's instructor Shima who was indisputably the "pilot in command" of the Piper and as such was "directly responsible for its operation and (had) final authority as to operation of the aircraft." (14 C.F.R. 60.2.)

Here we have a mixed question of law and fact. Clearly the regulation which has the force and effect of law places the responsibility directly on the instructor pilot in command. *Lange v. Nelson-Ryan Flight Service Inc.,* 259 Minn. 152, 108 N.W. 2d 428,

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[3]A reading of the plaintiffs' trial brief in that case would seem to indicate that they relied on the Manual as the sole controlling authority. Therefore there was no such issue for that Court to decide.

cert. denied 371 U.S. 953. This is really a question of interpretation of Federal law.

There was also substantial evidence and testimony on the subject by the various experts, including Baker's then managing agent in Honolulu as well as a Government Inspector, both of whom concluded as a matter of *fact* that under the circumstances of this case the instructor was the pilot in command who was *fully responsible* for the operation of the aircraft.[4] Thus the Court below made such a finding of fact which is supported by the overwhelming weight of the evidence. (D. para. 37, R. 559.)

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[4]The Pilot Operators Aircraft Accident Report (P.X. 7) contained the following information:

"2. Pilot at the Controls: Charles I. Shima"

This was prepared by Baker's then manager in charge of Honolulu operations George R. Carter. This exhibit was offered into evidence among other things as an admission against interest of Baker's managing agent Carter. (Tr. 805-13.) *Pekelis v. Trans-Continental Western Air,* 187 F. 2d 122 (C.A. 2); *Hickman v. Taylor,* 329 U.S. 495. No issue has been made on this appeal regarding any error in as to its admission. See: Rule 18, 2 (d) of the rules of this Court and Baker's Specifications of Error. (B.Br. 13, 14.)

Furthermore Mr. Carter confirmed this conclusion in his testimony where he said "the instructor would normally be the pilot in command" (Tr. 815) and would be monitoring the controls (Tr. 816, 825, 826).

Joe E. Brandt, the chief investigator of this accident for the F.A.A., testified that "The pilot in command would be the instructor since he actually was the only man qualified in the aircraft." (Tr. 1182.)

Emmet James Kay, Sr., who was called as an expert instructor pilot testified that when a student is flying with an instructor, the instructor is the pilot in command and responsible at all times; that the decision to take off at any time (such as in the situation involved in the accident) would be that of the instructor; that the instructor pilot in command is responsible for the acceptance of any clearance both according to the regulations (Tr. 601) and in accordance with general flying school practice (Tr. 603).

There is thus little profit in a discussion of the evidence and inferences to be drawn therefrom pro and con as attempted by Baker. (B.Br. 17, 19-20.) As mentioned earlier, this is an appeal and not a trial de novo on the record, and the findings of the trial Court must stand unless found to be "clearly erroneous" under Rule 52(a) Federal Rules of Civil Procedure.

The cases cited by Baker (B.Br. 18) are inapposite as they deal with situations where the *cause* of the accident was *unknown*. In this case, the cause was clearly established and is not now at issue, being expressly conceded by Baker in its statement "This finding is not disputed by Appellant Baker." (B.Br. 4.) This alone distinguishes the case at bar from those such as *Hall v. Payne,* 189 Va. 140, 52 S.E. 2d 76, and the *unreported oral ruling* in *Haddon v. Atkinson,* Civil No. 1023, Circuit Court, Third Circuit, State of Hawaii. This latter case is not controlling for at least three distinct reasons:

1. There again the cause of the crash was unknown. "Obviously, the state court decisions would not be controlling in the federal court in such a case unless the evidence was substantially similar." I A Moore's Federal Practice (2d ed.) Para. 0.307 (2), p. 3305, n. 10.

2. A question of interpretation of Federal law is involved, i.e., 14 C.F.R. Sec. 60.2, *Authority of the pilot. Towner v. Commissioner of Internal Revenue,* 182 F. 2d 903, 907 (C.A. 2).

3. In any event, the Federal Court need not follow an unreported (oral) decision of a state trial Court which under state practice does not constitute a precedent in that or any other Court of the state. *King v. Order of United Commercial Travellers of America,* 333 U.S. 153.

It should be noted at this juncture, that Baker nowhere seems to acknowledge the *finding* of the Court below that Shima was in fact negligent. On the other hand, it complains in its brief that such was the *only* issue tried with respect to Baker (B.Br. 21-22), and therefore it was improper for the Court below to have found against Baker on a separate theory of liability. In Plaintiff's Statement of the Case earlier, it was clearly demonstrated at the hearings on the motions for new trials that the District Court *had* found that Shima was negligent. (Tr. 15, October 1, 1965.) This would appear to put Baker on the horns of a dilemma. If it argues too vehemently against the Court's primary thesis (the failure of Baker to have furnished to the Decedent an adequately informed and trained instructor pilot in Shima) as not being an issue fully and fairly tried, then it may find itself faced with the negligence of Shima alone as a basis of its liability which the Government has argued was a superseding and thus the sole proximate cause of the accident. (G.Br. 11-21.) Such an argument by Baker could lead to its being held solely liable for the accident, whereas the theory of the Court below makes Baker's individual negligence a continuing breach of its duty to the Decedent and not the last

act of negligence. (D. para. 55, R. 574.) But see the argument on proximate cause, *infra.*

Actually there is no inconsistency whatsoever between the two separate theories of Baker's negligence. One is based upon a direct duty and a high standard of care of the flying school owed to its students and the other is based upon *respondeat superior* for the negligence of the instructor Shima. In the latter case, ordinary negligence on the part of Shima would be sufficient to hold Baker liable but in the former case only slight negligence would be required.

The Court below, in line with the authorities, found that Baker owed to the Decedent the highest degree of care similar to that of a carrier. (D. paras. 36, 55, 68, R. 558, 574, 598.) *Kasanof v. Embry-Riddle Co.,* 157 Fla. 677, 26 So. 2d 889; *Linam v. Murphy,* 360 Mo. 1140, 232 S.W. 2d 937. The student is entitled to place implicit reliance upon the instructor's superior knowledge, flying experience, and prudence in all matters concerning the training. *Weadock v. Eagle Indemnity Co.* (La. App. 1943), 15 So. 2d 132. See, *Annotation:* 17 A.L.R. 2d 557. As mentioned earlier, these authorities were presented to the Court and counsel well in advance of trial by way of a Trial Memorandum filed February 28, 1964. Thus the standard of care of Baker through the quality of its flying instructor Shima was considered at issue. Actually it is difficult to see how the two theories can be extricated one from the other. It is conceivable that had Shima been held only slightly negligent, then Baker could have been held directly liable and

not vicariously so. But this is dealing in sophistry and is not in accord with the evidence.

The fact that Plaintiffs out of an abundance of caution amended their complaint and the pre-trial order accordingly (with leave of Court) in order to add the specific words of the District Court's theory of negligence of Baker should in no way be construed as an admission that such issue was not fully tried.

The allowance of the amendment came squarely within the provisions of Rule 15(b), Federal Rules of Civil Procedure.

> "(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the trial of these issues. . . ."

Baker acknowledges that the issue of Shima's level of training was in fact raised through the testimony of Emmet Kay, the instructor from whom Shima had received his training. (Tr. 590-592, 600, 626, B.Br. 26.) But Baker fails to note that Joseph Eshelman Jones, another expert on flying instruction, also testified regarding the general standards in the community regarding the instruction of instructor pilots (Tr. 1330-1331, 1343-1346) and in particular on the subject of wake turbulence and the handling of aircraft in

such situations. (Tr. 1332-1333.) Mr. Jones was thoroughly cross examined on these standards of training of instructors by Baker's counsel. (Tr. 1351-1354.)

Baker relies on Rule 16, Federal Rules of Civil Procedure, in support of its thesis that nothing outside the pre-trial order should have been considered at issue. If this were true, it would render Rule 15(b), *supra,* nugatory.

Moreover, according to the local practice generated in some degree by skepticism among the members of the local bar, the Pre-trial Order in this case was not made quite as broad as indicated by Rule 16, *supra,* but rather contained the following final order endorsed thereon:

> "It is Hereby Ordered that the foregoing constitutes the Pre-trial Order in the above-entitled case; that it shall supplement the pleadings herein and govern the course of the trial of this cause, unless modified to prevent injustice." (R. 380.)

Certainly if Rule 15(b) calls for liberality in amendments to the pleadings even after trial it follows that Rule 16 must be equally as liberal. The Court below properly granted the Motion to Amend the Complaint (R. 648, 649) and the Pre-trial Order accordingly (R. 625, 626).

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE DECEDENT ROBERT FURUMIZO WAS NOT CONTRIBUTORILY NEGLIGENT AND DID NOT ASSUME THE RISK WHICH LED TO THE CRASH.

It should be noted at the outset that this issue was raised and is here contended by the defendant Baker *only*. The Government at no time has suggested that these defenses might be available against the Plaintiffs; as a matter of fact the Government's strongest point is the contention that the negligence of Baker's instructor Shima was the *primary* negligence which led to the crash, since he had the direct or primary responsibility for the operation of the Piper. (G.Br. 13-19, 27-30.)

Baker again overlooks the basic principle set forth in *Lange v. Nelson-Ryan Flight Service, Inc.,* 259 Minn. 460 (1961), 108 N.W. 2d 428, *cert. denied,* 371 U.S. 953, that the flight instructor as "pilot in command" of the aircraft is responsible for the operation and safety of the flight, 14 C.F.R. 60.2; and through him the flying school owes the student the duty of care of a carrier to a passenger. Thus, *as a matter of law,* the student pilot on a training flight does not assume risks of an extraordinary character, nor those arising from the instructor's own negligence (any more than a passenger aboard an airliner). *Weadock v. Eagle Indemnity Co.* (La. App.), 15 So. 2d 132; *Lange v. Nelson-Ryan Flight Service, Inc.,* 263 Minn. 152, 116 N.W. 2d 266 (same case as above), *cert. denied,* 371 U.S. 953; *Plewes v. City of Lancaster,* 3 Avi. 17,286 (Pa. Com. Pls., 1950).

Baker also fruitlessly indulges in rearguing the evidence relating to the subject (B.Br. 27). The Court below analyzed *all* of the evidence and came to the ultimate finding that "37. Furumizo was not negligent in any manner in this respect, since his instructor was in charge of the plane, and at takeoff especially would be the one to exercise judgment in accepting clearance from the tower.[5]" See also the testimony of George R. Carter in this regard (Tr. 856-858, 867, 901) and the general discussion of the law and the facts on the subject of the "pilot in command" in Paragraph III, above.

Since the District Court made a detailed analysis of the evidence before arriving at its ultimate finding of fact in this respect, we are once more faced with the conclusion that appellee Baker has utterly failed to show that such a finding was "clearly erroneous"

"[5]There is no direct evidence that decedent had actually been instructed adequately or at all on the dangers of large plane wake vortices or turbulence, although there is some weak evidence from which an inference was attempted to be drawn by the defendants to the effect that he must have received some instruction on such matters. For example, one of his former instructors testified that it was customary for him to give certain instruction on wake turbulence to his students at a particular state during the ten hours and forty minutes of flying instruction that Furumizo was shown to have had and there is evidence that various information bulletins customarily mailed to all pilots and flying schools, etc., were posted on the bulletin board and presumably read by all, including students like Furumizo. However, the Court finds such alleged evidence insufficient to establish by a preponderance of the evidence, or at all, that Furumizo actually had been instructed on the dangers of wake turbulence and therefore knew or should have known about it. The Court therefore rejects any theory of contributory negligence or alleged assumption of risk based on any alleged knowledge or presumption of knowledge on the part of Furumizo concerning the dangers of wake turbulence." (R. 559, 561; Tr. 596-600, 632.)

within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Thus we have a rule of law fortified by findings of ultimate fact that the Decedent could not be and was not in fact under the circumstances contributorily negligent nor could he or did he assume any risk which led to his demise.

V. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE NEGLIGENCE OF BOTH DEFENDANTS OR THEIR EMPLOYEES CONCURRED IN OR PROXIMATELY CAUSED OR CONTRIBUTED TO THE ACCIDENT.

The issue of causation appears to be the one where there is so much divergence in the views of the Court below and the Appellants. Here, too, Plaintiffs for the first time do not agree completely with the views of the Court set forth in its Decision.

The Court stressed its finding of "negligence of defendant Baker in not furnishing in Shima an adequately informed and trained pilot" (D. para. 42, R. 562; D. paras. 36, 55 and 68, R. 558, 574, 598).

The crux of that finding as it pertains to causation is found in the following portion of the Decision:

> "38. This negligence of Baker, since it antedated the actual takeoff of the Piper was not the sole and last independent cause of the accident, but continued as a contributing cause from before the accident until it happened." (R. 560.)

This theory of Baker's negligence therefore completely frustrates the contention of the Government that it was the negligence of Shima alone which was latest in point of time and was therefore the *sole* proximate cause of the accident (G.Br. 11-12, 20-21). Thus the Government stresses the negligence of Shima (G.Br. 12-19) and disregards the Court's finding of the continuing negligence of Baker by way of the breach of its direct duty to the Decedent which a flying school owes to its student.

In this regard there is no question from a reading of the Decision as a whole that Shima was found to be negligent, and this was later confirmed by the Court below (Tr. 15, October 1, 1965). The only question is how this affects the negligence of the employees of the Government in point of time and in relation to causation.

On the other hand, Baker totally ignores the negligence of Shima and complains that the Court's finding as to the direct negligence of Baker in not furnishing in Shima an adequately informed and trained instructor pilot was a question which was not fully and fairly tried on the issues joined below. (B.Br. 20-26).

It is submitted that the end result should be the same whether we view Baker's liability as vicarious through the negligence of Shima or direct through its failure to provide an adequately informed and trained instructor. In the latter situation, there is no problem with the aspect of concurrent causes. But the Government contends that in the former situation Shima's negligence should be considered an intervening cause

since it should not have been anticipated or was *not reasonably foreseeable* (G.Br. 20-21), citing *Mitchell v. Branch and Hardy,* 45 Haw. 128. The rule of law is correct but its application to the facts of this case by the Government truly misses the mark in the following statements:

> "The Honolulu controllers had no reason to believe that Mr. Shima would ignore the warning given him and take off immediately." (G.Br. 20) and
>
> "Clearly, Shima's reckless action could not have been foreseen." (G.Br. 21.)

The two foregoing arguments in support of the Government's thesis regarding causation completely overlook the fact that the controllers actually stood there and watched the Piper take off immediately after the clearance was issued, did nothing to prevent it and expressed no concern or alarm over the fact whatsoever! (Tr. 95, 234, 342, 343, 365). It could well be argued that if such action by Shima were considered so reckless, the tower controllers had a duty to admonish him as soon as they observed the Piper commence its takeoff roll. A reading of their entire testimony would indicate that they were totally unconcerned over the situation. This is one of the things which impressed the Court below so unfavorably. (D. paras. 40, 41, R. 562-563.)

Thus it is clear from the uncontroverted testimony of the tower controllers themselves that not only did they in fact foresee that Shima would take off immediately but they actually *stood by and watched him do so!*

Under such a state of the record, there could be no alternative but to conclude that the test of *Mitchell v. Branch and Hardy,* 45 Haw. 128, is fully met and the issue of intervening cause is factually non-existent. This also renders moot the objection of Baker to the alternate (primary) finding of the Court below of Baker's direct negligence. Thus the Judgment can and should be allowed to stand based on the negligence of the tower controllers and Shima individually for which the two Defendants are jointly liable.

VI. THE DAMAGES AWARDED BY THE DISTRICT COURT WERE NOT ERRONEOUS OR EXCESSIVE. (Baker's Specifications of Error Nos. 7 and 8.)

(a) After summarizing briefly the evidence of the Decedent's remarkable work record the Court below stated:

> ". . . . Any prognosis for the future is conjectural to a certain extent, but this Court holds that the evidence, as clearly *as it is possible to demonstrate,* justifies a finding that Robert Furumizo *would have been promoted to GS-9 by September 1, 1963,* would have achieved or would achieve the successive steps of base salary in that grade at least as early as the dates indicated on Exhibit B-6-4 and *would be promoted within a reasonable time to GS-11.* The testimony of the witness Wong indicates that a man of decedent's high ability, qualification and drive could normally expect to be promoted to GS-11 in from three to six years, with certain contingencies, such as transferring to a different branch and availability

> of open positions. *To be conservative,* this Court finds that *with reasonable certainty* he would have achieved the equivalent of GS-11 in base salary *in not more than ten years* after his promotion to GS-9" (emphasis added) (D. para. 70(c), R. 600, 601).

Even a reading of Baker's citations to the record on this issue (B.Br. 28-30) makes it clear that the Court below was justified in making its findings based upon "reasonable certainty" as Baker contends is the criterion set down in *Condron v. Harl,* 46 Haw. 66. It would therefore serve no purpose to quote from the testimony any further as Baker has failed to even hint that the Court's finding in this regard was "clearly erroneous".

No such concession was made by Plaintiffs' counsel. In Plaintiffs' reply brief on damages the following was stated in answer to Baker's similar position below:

> "The record should be set straight on the subject of Plaintiffs' contentions regarding the use of the GS-11 pay scale in calculating the damages. Plaintiffs' failure to make any such *strong* contention in its Opening Brief was based upon the problem of 'reasonable certainty' and the fact that such a promotion of the Decedent would hinge on the existence of vacancies in his field. Nevertheless, Mr. Wong testified unequivocally that in his opinion the Decedent would have ultimately reached the level of GS-11 and that the average period of time for a person in that field to reach this level was 3-6 years. Thus, taken together with the other evidence, at the very outside

it could be argued that a calculation should be based on the GS-11 pay scale beginning September, 1969 (6 years after the promotion to GS-9). It is interesting to note that our Supreme Court, in testing the validity (excessiveness) of a verdict in a death case in *Ginoza v. Takai Electric Co.*, 40 Haw. 691, 707, based its analysis on an acceptance of the following evidence of a like nature:

"'. . . evidence establishes that the decedent . . . had received two salary increases during the year of employment immediately prior to his death; and that in a period from *3 to 6 years thereafter* he would *probably* have developed into a first-class mechanic at a salary of approximately $300.00 per month; . . .'" (Emphasis added; R. 499-500.)

It should be noted that *Condron v. Harl, supra,* 46 Haw. 66 was not a death case but *Ginoza, supra,* was. The distinction is noted in *Spangler v. Helm's New York-Pittsburgh Motor Express* (Pa.), 153 A. 2d 490, 492:

". . . Difficulty of computation is not a barrier to full recovery. The commission of a wrong carries with it the duty to make amends. And if the mending process is additionally expensive because of problems encountered in ascertaining the cost of the rehabilitating agents, that process becomes part of the obligation the tortfeasor must assume."

More appropriate than *Condron v. Harl, supra,* is *Rohlfing v. Moses Akiona Ltd.,* 45 Haw. 373, which sustained a cause of action by the estate of a four year old who died by drowning. In that case the

Supreme Court of Hawaii discussed the necessity of the trier of fact indulging in certain assumptions in death cases. (45 Haw. at 393.)

One of the assumptions in which the Court below indulged to the prejudice of the Plaintiffs was that by the time the Decedent had achieved GS-11, the cost of living allowance (COLA) would have been eliminated. Thus the computations were actually based on the figures in evidence covering a GS-9 *with* COLA as being substantially the same as a GS-11 without COLA. (D. paras. 70(d)(e), R. 601, 602.)

How can it be said, upon all the evidence that either such finding could be deemed "clearly erroneous".

(b) Baker's cryptic comment (B.Br. 30, last par.) regarding the Court's failure to apply the 1.15865 factor to the deductions for pension contributions and income taxes in order to make up for the discount for the period from the date of death, June 20, 1960, to the date of the decision, June 20, 1965, is not intelligible as such to this writer. Specific references to the portions of the decision being attacked, as well as the record, are necessary in order to clarify this point. Until then it cannot be fairly answered. (There will be more discussion, *infra,* however, on the propriety of the use of such a computation at all since it eliminates pre-judgment interest and deals with improper discounting for income taxes.)

(c) Once more with respect to the point made in the first paragraph on page 31 of Baker's Brief, it cannot be intelligibly approached without specific

reference to the portion or portions of the Decision being attacked or the evidence upon which Baker relies in support of its position. The Court did state:

> ". . . . The evidence seems to this Court a bit ambiguous as to whether the 35% testified to by Mrs. Furumizo as being the proportion of income spent by decedent on himself, included retirement system contributions. *This Court gives the benefit of the doubt to the defendants on this item.*" (Emphasis added); (D. par. 70(k), R. 605.)

(d) With respect to Baker's final point contending that $15,000 general damages to the estate is excessive (B.Br. 31, 32), as is often stated, "verdict" comparisons are unrewarding. The issue of damages for pain and suffering incident to death when the period is a short one and proof is difficult was discussed in *Rohlfing v. Moses Akiona Ltd., supra,* 45 Haw. 373, 396-398. There the Supreme Court of Hawaii rejected as a matter of law any such theory as instantaneous death and held that in all such cases this involved a question to be determined by the trier of fact stating:

> ". . . . How much evidence is required and how much may be left to conjecture we prefer not to say at this state of the case." 45 Haw. at 397.

In such cases the consciousness of approaching death is a proper element to be considered in evaluating mental suffering. *Watson v. Augusta Brewing Co.* (Ga.), 52 N.E. 152; *Elliot v. Arrowsmith* (Wash.), 272 Pac. 32; *Jenkins v. Hennigan, et al.* (Tex. Civ. App.), 298 S.W. 2d 905. Cf., *Gallagher v. U.A.L.,*

C.C.H. 3 Avi. 17,725 (D.C.E.D. Pa. 1951), 1951 U.S. Av. R. 514.

In *Meehan v. Cent. R.R. Co. of N.J.,* 181 F. Supp. 594 (S.D.N.Y.), the decedent died from drowning when a train in which he was a passenger passed through the opening of a drawbridge and into the water below. After reviewing the facts of the case the Court stated:

> "Under these circumstances this Court is unable to say that the decedent endured no pain and suffering. It is true that this cause of action must be sustained, if at all, on circumstantial evidence. However, circumstantial evidence cannot be disregarded."

Other drowning cases are *Kimmel v. Solow* (Super. Ct.), 199 N.Y.S. 2d 375 and *McCauley v. State,* 9 App. Div. 2d 488, 195 N.Y.S. 2d 253. Also in *Hickman v. Taylor,* 75 F. Supp. 528 (E.D. Pa.), an award was made to the estate of a seaman who died when a tug on which he was working sank. He was found in his underwear and the Court *presumed he was asleep* when the tug sank, yet an award was made for pain and suffering.

In the case of Robert Furumizo, the circumstantial evidence is strong. First there was the brief period when the airplane became out of control and fell to the ground. (Tr. 95.) During this time there was obviously a fear of impending death. Thereafter the evidence indicates that contact with the ground was not severe but rather the aircraft just collapsed "like

a wet towel." (Tr. 101.) Moreover the evidence further indicates that fire commenced immediately (Tr. 95, 979) and the exit doors to the aircraft were blocked (Tr. 798). The instructor, Shima, appeared to be making an attempt to extricate himself from the wreckage (Tr. 801) and the Decedent was apparently shielding his face from the fire with his right arm in front of his face "as if he was anticipating something" (Tr. 800). Undoubtedly for a period of time, however brief, there must have been the sheer horror and excruciating pain of being burned up in a funeral pyre.

As previously stated, verdict comparing is an unrewarding task. In one recent case the Supreme Court of Florida held that a verdict of $99,500 for pain and suffering prior to death from burns was not so shockingly excessive as to warrant judicial interference. *Florida East Coast Ry. Co. v. Stewart* (Fla. App.), 140 So. 2d 880. Admittedly in that case the decedent lived for eight days. In *Dellaripa v. N.Y., N.H. & H.R. Co.,* 257 F. 2d 733 (C.A. 2) the Second Circuit held that the trial judge had not abused his discretion in denying a new trial because a jury awarded $22,500 for pain and suffering where the decedent expired on the same day as the accident. The Court of Appeals expressed some doubt as to its power to review the trial judge's exercise of discretion in this particular.

It should also be noted that the Court below, in justifying the $15,000 award, properly took into consideration the decreased value of the dollar in its

comparison of this with earlier awards made in similar cases of sudden death. (D. para. 71(a), R. 606.)

VII. THE COURT BELOW ERRED IN FAILING TO AWARD ADEQUATE DAMAGES IN CERTAIN SPECIFIED AREAS. (Plaintiffs', Cross-Appellants' Specifications of Error Numbered 1 through 6, supra at pages 5 and 6.)

a. Scope of Review on Cross-Appeal.

This is a limited cross-appeal relating only to the question of damages wherein Plaintiffs, Cross-Appellants contend that the Court below erred in certain of its calculations pertaining to special damages and considerations pertaining to general damages. Vol. 3A Barron and Holtzoff, Federal Practice and Procedure, §1552, pp. 59-60.

In view of the fact that the computations are complex and some of the considerations are subjective no request is being made to this Court for additur. 5 Am. Jur. 2d, *Appeal and Error,* §946, p. 374. Rather, a remand is being sought with directions to the Court below to reassess the damages in light of the errors specified upon this cross-appeal.

b. The Court Below Erred in Failing to Adjust the Special Damages to Compensate for the Decrease in the Value of the Dollar Throughout the Period of the Decedent's Life Expectancy. (D. para. 70(g), R. 602.)

As mentioned above, the trial judge in several instances took judicial notice of the decreasing value of the dollar in relation to a comparison of earlier

awards (D. paras. 71(a), (c), R. 606, 608), and even during the *five year period* between the date of death and the filing of the decision (D. para. 71(d), R. 609). And yet with the established trend from the evidence and in the law, the value of the dollar was frozen as of the latter date by the Court.

Based upon numerous authorities including the unequivocal statement in 25 C.J.S. *Death,* §100 at p. 1242, that, "Damages should be increased in proportion to the diminishing purchasing power of the dollar", taken together with the testimony of Myles Grover (the actuary called by the Plaintiffs) relating to Chart II, GS. F.P.M. Supp. 992 (Exhibit P-44), there is both a testimonial basis in the record as well as a legal basis for taking into account the future anticipated decreasing value of the dollar resulting in necessary increases in salaries.[6]

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[6]The following is quoted from page 10, lines 8 through 16 of the deposition of Myles Grover, Exhibit P-51:

> "Q. If you were attempting to obtain the present value of future anticipated earnings of a person in either one of these pay scales, in order to assure sufficient money in the future to replace such income, what factors would you consider appropriate to take into consideration?
>
> A. I would take into consideration a rate of interest, which I have already quoted, and a life expectancy, which I have already mentioned, *and I would reflect to some extent the expected, or the long range increase trend in wages.*" (Emphasis added.)

With respect to the legal basis for this proposition the following pertinent quotes are made from Annotation: 12 A.L.R. 2d 611—Changes in Cost of Living or in Purchasing Power of Money as Affecting Damages for Personal Injuries or Death:

> "Change in cost of living or in purchasing power of money is sufficiently a matter of common knowledge that even the jury, or the court when fixing damages, may take it into

In addition there is a factual basis. The history of the Federal Pay Scales from 1923 through 1964 (at the time of trial) appearing in Exhibit P-44, reflect that the increase over the past 40 years approximates 3.3 per cent per year on a straight line basis. The rate of increase from 1945 through 1964 is almost 5 per cent per year. It should be noted that the 3.3 per cent rate incorporates a period of economic depression in the early 1930's which should refute any contention that such a thing as deflation should ever occur in the economy of the United States. This projected 3.3 per cent annual rate of increase has substantial support in the authorities including current history to the date of this writing all of which it is felt can be judicially noticed.[7]

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account in actions of damage for death also without evidence being submitted." at p. 644.

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". . . counsel may show (the) court the approximate percentage of change that has occurred in recent years as a basis for its judicial notice." at p. 645.

* * * * * * *

"Section 15, Probabilities of Future Change.

"It has been held that the court may take into account future prospects of inflation or deflation in fixing damages for personal injuries (cit.)" at p. 646.

* * * * * * *

". . . the decreased purchasing power of the American dollar, with little or no prospect for any change, *except probably further decrease for many years*, is a pertinent factor to be taken into consideration in determining the award . . ." (Emphasis added.) *Weadock v. Eagle Indemnity Co.* (La. App.), 15 So. 2d 132.

[7]The Federal Salary Reform Acts of 1962 and January 1964 were brought to the Court's attention during trial and form part of the basis for 3.3 per cent per year increase.

Coincidentally, in the spring of 1964 the Administration laid down a wage boost guideline of 3.2 per cent whereas the unions

It is no answer to contend in reply that payment is being made today in today's dollars. The devalued dollar of future years cannot be rejuvenated by taking the present value of such dollars and investing them at 3¾% interest to provide those dollars required in the future. We still end up with the same dollar which we know is going to be worth less than it is today.

With respect to a method of compensating for such a factor a system of computation and the actual computations have been provided to the Court below (R. 507, 508, 514-516).

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had taken the position of demanding at least a 4.9 per cent wage hike in 1964. *Time,* April 3, 1964, p. 24. This was carried out in the Federal Salary Reform Act of July 1964 (after trial) averaging an approximate 3.2 per cent increase in G. S. pay scales. This was followed by the Federal Salary Reform Act of 1965 averaging a 3.6 per cent increase. (In the meantime the Federal Judiciary received a substantial increase in salaries to make up for the extensive period the rates had remained the same.) Just recently legislation was introduced and passed the U.S. Senate granting Federal pay increases plus fringe benefits ". . . close to (President) Johnson's 3.2 per cent wage guidelines." (Washington UPI.) The Honolulu Advertizer, July 12, 1966.

See Labor Cost Trends, Economic Report of the President, January 1966 pp. 76-79, and in particular chart 10 on page 77. President Johnson and economic adviser Heller have suggested wage guideposts:

> "The average money-wage increase is to be no higher than the average increase in physical productivity; . . .
>
> * * * * * * *
>
> ". . . The United States, for example, can hardly help but grow at the rate of 3 per cent or more, even if we do not rouse ourselves but merely keep our system working reasonably well." Paul A. Samuelson, *Economics,* Sixth Edition, page 792.

See also the Keynesian philosophy of economy. U.S. Business in 1965, The Economy, *Time,* December 31, 1965, pp. 64-67B. The Federal Government's theory of economy sets the pattern for wage increases as well as taxes. (See discussion *infra* paragraph (d) re tax treatment of the damage issue.)

c. The District Court Erred in Failing to Allow Pre-Judgment Interest.

In its calculation of the "present value" of lost future earnings the Court below took the figures given by the actuary effective as of the date of death June 20, 1961 and carried them forward five years to the date of the Decision at the same interest rate of 3¾%, *eliminating* any interest on the amounts which would have been earned during that same period. (D. para. 70(h), R. 602, 603; para. 71(b), R. 606, 607.) This method effectively eliminated all pre-judgment interest for the five year period before Plaintiffs were able to obtain their judgment.

> "In computing present value in wrongful death cases a mistake is frequently made in considering lost contributions from the date of death through the . . . life expectancy of . . . the decedent, and computing the 'present value' of that sum as though it were to be received entirely in the future. The fact of the matter is that by the time cases get to trial, several years have usually elapsed from the time of death. Reduction to present worth should be made on that part of the pecuniary loss that would be received in the future, as of the date of the jury's determination, but as to those monetary contributions that would have been received prior to the jury's determination interest should be added, since that is a past loss rather than a future loss. Thus, assuming that the death occurred two years ago at a time when the decedent had a life expectancy of 20 years, and assuming further that the annual contributions to his family amounted to $10,000, the jury should consider the fact that $20,000 has already been

> lost, *in the past,* and that more than $20,000 should be awarded to fairly compensate the beneficiaries. As to future loss the jury must deduct the two years that have expired from the then life expectancy of the deceased, and compute the present value of $10,000 lost annual contributions for 18 years in the future." 1 Kreindler, Aviation Accident Law, §13.06(1), p. 414 (1963).

The Supreme Court of Hawaii has not specifically passed on the issue of pre-judgment interest in death cases. It has held that "general damages" need not be reduced to present value but that "special damages" must be so discounted. *Ginoza v. Takai Electric Co.,* 40 Haw. 691, 705-708. Since that case involved a jury verdict, the opinion merely deals with generalities relating to instructions to the jury and does not refine the meaning of "present value."

Nor was the specific issue raised in *United States v. Hayashi,* 282 F. 2d 599 (C.A. 9). Although the case was tried to a judge the present value of the loss of future support was calculated "on the basis of a formula agreed upon by the parties." (282 F. 2d at 601).

Pre-judgment interest is normally not allowed in *personal injury* cases on the theory that they are unliquidated claims. However, the better reasoned and apparent majority view is that a *death claim* is different and that the damages should be considered liquidated as of the date of death.

> "Where a claim accrues as of a certain date and can be ascertained or computed as of that

date, we think the better rule is to award interest upon the claim from that day forward . . . . In this case the total injury and whatever award was to be made therefor accrued with the death . . . . From that date forward it is proper that the defendant should pay interest in order that there may be a full award of damages. Certainly, if prospective damages are to be reduced to present worth, it is equally just that damages which have accrued should carry interest from the date of accrual, whether that date be death or otherwise." *Currie v. Fiting,* 375 Mich. 440, 134 N.W. 2d 611.

See also: 25 C.J.S., *Death,* §109, p. 1261 n. 18; *Bridenstein v. Iowa City Electric Ry. Co.,* 181 Iowa 1124, 165 N.W. 435; *American Ins. Co. v. Naylor,* 103 Colo. 46, 87 P. 2d 260; *Pepin v. Beaulieu,* 102 N.H. 84, 151 A. 2d 230; *Nou v. United Aircraft Corp.,* 342 F. 2d 232 (C.A. 3); *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (C.A. 2), *cert. denied,* 368 U.S. 989, *reh. denied,* 370 U.S. 965; *National Airlines, Inc. v. Stiles,* 268 F. 2d 400 (C.A. 5).

See also: *Annotation:* 96 A.L.R. 2d 1104; 29 N.A.C.C.A. L.J. 342-347, 24 N.A.C.C.A. L.J. 247; 110 U. Pa. L. Rev. 612-620.

The fairness of such an approach is emphasized in the problems besetting litigants today in getting their cases tried. Five years is a long time from accrual of cause of action to judgment, including over one year necessary for the Court below to write its decision in such a complex case as this.

The appropriate rate of pre-judgment interest should be six percent. Revised Laws of Hawaii 1955, ch. 191.

d. The District Court Erred in Deducting Estimated Income Taxes From Decedent's Anticipated Future Earnings in Calculating the Present Value of the Portion Thereof Which the Court Found He Would Have Contributed to His Family. (D. para. 70(i), R. 603-4.)

This issue was briefed at length in the Court below. (R. 399-401, 405, 406, 431-443, 500-503). Since then the question has become moot, since the Supreme Court of Hawaii has decided that:

> "We are in agreement with those jurisdictions which hold that the incidence of taxation is not a proper fact for a jury's consideration since 'it introduces a wholly collateral matter into the damage issue'. *Missouri-Kansas-Texas R.R. v. McFerrin,* 156 Tex. 69, 90, 291 S.W. 2d 931, 945. *Altemus v. Pennsylvania R.R.,* 32 F.R.D. 7; *Hardware Mutual Cas. Co. v. Harry Crow & Sons, Inc.,* 6 Wis. 2d 396, 94 N.W. 2d 577; *Bracey v. Great Northern Ry.,* 136 Mont. 65, 343 P. 2d 848 *cert. denied,* 361 U.S. 949 (1960) . . . ." *Kawamoto v. Yasutake,* ..... H. ....., No. 4428 In The Supreme Court of the State of Hawaii, February 1, 1966.

That case had to do with an instruction regarding nontaxability of the award. Nevertheless it is a broad statement of the thesis and undoubtedly includes reduction of the award for taxes on lost future earnings.

In *Hardware Mutual Cas. Co. v. Harry Crow & Sons, Inc.,* 6 Wis. 2d 396, 94 N.W. 2d 577, 582 the court stated:

"(b) *Award for lost earnings.* Defendants suggest that since the earnings Huber would have received, had he not been injured, would have been subject to income tax and since the award will not be subject to income tax, the jury should be instructed accordingly so that it will make an appropriate reduction in the amount. Defendants rely upon a decision of the English House of Lords. British Transport Commission v. Gourley (1956) A.C. Law Reports 185."

(where an award for loss of future earnings was reduced by the probable tax thereon.) The Court cited with approval the *dissenting* opinion in that case.

In *Bracey v. Great Northern Ry.,* 136 Mont. 65, 343 P.2d 848, 853, *cert. denied,* 361 U.S. 949, the court cited with approval *Combs v. Chicago, St. Paul, Minneapolis & Omaha Ry.,* 135 F. Supp. 750, 751 (D.C. Iowa) as follows:

"The Courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for *future impairment of earning capacity.*" (Emphasis added.)

The only conclusion that can be drawn from the foregoing is that the case should be remanded with instructions to the District Court to recalculate the "special damages" without any "discount" for income taxes.

There is one possible alternative if the Court should follow the rationale of *O'Connor v. United States,* 269 F. 2d 578 (C.A. 5). If a distinction is

made based upon "The compensatory nature of the right to damages under the Tort Claims Act", then the damages against the United States *only,* as opposed to Baker, might require "such consideration of Federal Income Taxes." (269 F. 2d at 584). See following discussion under subparagraph (e).

e. The District Court Erred in Refusing to Allow the $250 Portion of the Reasonable Burial Costs Which Was Paid by the Veterans Administration as Damages to the Estate Against the Defendant Baker. (D. para. 71(a), R. 605.)

The collateral source doctrine is well established in the law today although it has been subject to some criticism by the students of the law. 22 Am. Jur. 2d, *Damages* §206 et seq.; *Annotations:* 18 A.L.R. 678, s. 95 A.L.R. 575; 4 A.L.R. 3d 535. The only exception is under the Federal Tort Claims Act which has been said to be remedial in nature. Even this approach is questionable when it is observed that the Act adopts causes of action of the *lex locus delicti.* Nevertheless the Supreme Court has so decided in cases where the plaintiff has received compensation as a result of injury or death from some other source of *unfunded* revenues. *Brooks v. United States,* 337 U.S. 49, 54; on remand, *United States v. Brooks,* 176 F. 2d 482 (C.A. 4); *United States v. Gray,* 199 F. 2d 239, 244 (C.A. 10).

Thus, Plaintiff concedes that such a deduction from the award to the Estate against the United States was proper in this case. But that does not absolve Baker from liability therefor. *United States v. Hayashi,* 282 F. 2d 599, 603, 604 (C.A. 9); *Gypsum Carrier Inc. v.*

Handelsman, 307 F. 2d 525 (C.A. 9). See, *Annotation:* 4 A.L.R. 3d 517.

f. The District Court Erred in Its Determination of the General Damages Allowed to the Wife of Decedent by the Court Placing Itself in the Position of an Average Citizen and Juryman in the Community Rather Than Based on the Court's Own Individual Judgment.

In referring to the general damages to be awarded to the wife of decedent the Court below stated in Paragraph 71(d) of its Decision (R. 612):

> "However, this Court must fix a monetary amount for this loss and this Court feels that it is not amiss for a judge in a case like this to try to put himself in the place of average citizens and jurymen, and try to reach an amount that he has reason to believe would approximate what such a jury in his community, without undue emotional influence, would award as reasonable. This the Court has tried to do. . . ."

"When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principles of law and *he is* also *the tribunal compelled to determine what the facts are.*" (Emphasis added.) 89 C.J.S. *Trial,* §574, p. 351; *Territory v. Fujiwara,* 33 Haw. 428, 431.

> ". . . the Court, as trier of the facts, cannot delegate its duty to a jury except as provided by law, and under a statute making it mandatory for the court to decide issues of fact where the parties have waived a jury trial the court cannot frame special issues for a trial by jury without the con-

> sent of the parties who have waived trial by jury; . . ." 89 C.J.S. *Trial,* §580, pp. 357, 358.

See Rules 38(d) and 52(a), Federal Rules of Civil Procedure.

As this Court has stated once more from *United States v. Hayashi,* 282 F. 2d 599, 602 (C.A. 9):

> "It is the function of the fact finder to evaluate all the evidence produced on the question of damages."

It is the duty of the trial judge to *personally* evaluate the damages, even though such elements of general damage "are difficult of exact estimation and to which no standard of value is applicable." *Gabriel v. Margah,* 37 Haw. 571, 581.

What the Court below has done is to make an extremely sophisticated computation of special damages far beyond the capacity of a normal jury and then when it came to general damages merely "second guessed" what a local jury would award. In effect the Court was thereby taking judicial notice that jury verdicts are low in Hawaii. This is emphasized by the contrast between the amount of special and general damages awarded to the wife of decedent: $126,-. 216.46 vs. $50,000.

The measure of general damages to Mrs. Furumizo is as set forth in *Ginoza v. Takai Electric Co.,* 40 Haw. 691. The following is a quote of the language from the instruction approved in that decision paraphrased to incorporate the appropriate language of Revised Laws of Hawaii, 1955, §246-2:

> ". . . the damage, if any, arising from the loss of (love, affection, society, companionship, comfort, consortium, protection, fellowship, marital care, attention, advice and counsel of her husband Robert) having regard to the probable duration of his life, the *amount he has customarily contributed to the support and well-being of his wife,* if anything, *and what* in (the court's) judgment, *he would have contributed to her during the remainder of his life* but for the accident causing his death, taking into consideration the age, health, habits, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or diminution of that ability with the lapse of time, *his earning power and rate of wages:*" (emphasis added). 40 Haw. at 706.

Thus, contrary to the views of the Court below (D. para. 71(d), R. 611) the Supreme Court of Hawaii has held that there is and should be, a direct relationship between special and general damages in death cases.

As difficult as it might have been it was the obligation of the trial judge to *subjectively* evaluate the general damages, which he admittedly did not do.

g. The District Court Erred in Its Determination of the General Damages Allowed to the Wife of Decedent by Taking Into Consideration Her (Favorable) Prospects of Remarriage and Her Employment, Health and Earning Capacity.

In rationalizing the low award for general damages to the wife of Decedent the Court below stated (D. para. 71(d), R. 610):

> "In the present case we have a *healthy,* well-educated, *attractive* young woman, only 27 years old, in 1961, with a single young child, who has a much better *prospect of remarriage* and much greater *earning ability. . . .*" (Emphasis added.)

Damages should not be reduced or mitigated by virtue of the fact that the surviving spouse has remarried or is engaged to be married. 25 C.J.S., *Death,* §114, p. 1263. Damages of a widow for the death of her husband are not to be confined to the period of her widowhood. *Gulf C. & S. F. Ry. Co. v. Moser* (Tex. Civ. App.), 277 S.W. 722, *rev'd on other grounds,* 275 U.S. 133. With respect to the *possibility* of remarriage see *Johns v. Baltimore & O. R. Co.,* 143 F. Supp. 15 (D.C. Pa.), *aff'd.* 239 F. 2d 385 (C.A. 3); *Curnow v. West View Park Co.,* 220 F. Supp. 367 (D.C. Pa.).

Evidence as to the health of the beneficiary is irrelevant and inadmissible. 25 C.J.S. *Death,* §127, p. 1296, ns. 88 and 89; *Seattle Electric Co. v. Hartless,* 144 F. 379; *Benton v. Chicago etc. R. Co.,* 55 Iowa 496, 497, 8 N.W. 330; *Simoncan v. Pac. Elect. R. Co.,* 166 Cal. 264, 136 Pac. 544.

It is wholly immaterial in determining damages for wrongful death whether the next of kin of the deceased had or had not other pecuniary resources (such as earning capacity) after his death. 25 C.J.S. *Death,* §126, p. 1295, n. 73; *Wilcox v. Bierd,* 330 Ill. 571, 162 N.E. 170; *Johnson v. Western Air Express Corp.,* 45 Cal. App. 2d 614, 114 P. 2d 688; *Stathos v. Lemich,* 213 Cal. App. 2d 52, 28 Cal. Rptr. 462; *Columbia*

Grocery Co. v. Schlesinger, 102 Ind. App. 617, 200 N.E. 414; *Presley v. Upper Miss. Towing Corp.* (La.), 153 So. 2d 416, *writ ref.,* 244 La. 1002, 1003, 156 So. 2d 56; *Crawford v. Hite,* 176 Va. 69, 10 S.E. 2d 561; *Matthews v. Hicks,* 197 Va. 112, 87 S.E. 2d 629; *Allen v. Hart,* 32 Wash. 2d 173, 201 P. 2d 145.

In addition to the question of pre-judgment interest the Court will also have to determine the date from which interest on the judgment starts to run as it is affected by the modifications in the amount of the judgment as a result of this cross-appeal. See *Annotation,* 4 A.L.R. 3d 1221.

CONCLUSION

For the reasons stated the judgment below as to liability and damages unchallenged on this Cross-Appeal should be sustained as to both defendants jointly and severally and the case remanded with directions to the Court below to increase the amounts of damages in accordance with foregoing points made on this Cross-Appeal.

Dated, Kailua, Kona, Hawaii,
August 17, 1966.

Respectfully submitted,
E. D. CRUMPACKER,
Attorney for Plaintiffs, Appellees and Cross-Appellants.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. D. Crumpacker.